



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No:7815/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES/NO
06 May 2025	— [REDACTED]
DATE	SIGNATURE

MOHLAMME ELVIS RAMOTSHEKISI

Plaintiff

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

Summary: *Rule 28 of the Uniform Rules of Court — application to amend pleadings — plaintiff left it for too late in the proceedings to bring his application for amendment of pleadings — the amendment is not made in good faith — no reasonable explanation for the delay — application for amendment of pleadings refused*

Rule 39(6) of the Uniform Rules of Court — absolution from the instance application — whether on the merits the plaintiff has proven a prima facie case against the defendant — plaintiff's evidence regarding whether he was pushed or pulled is not a material fact which warrants the granting of absolution from instance — application for absolution from instance refused

JUDGMENT

BOTSI-THULARE AJ

Introduction

- [1] Before me are two interlocutory applications. The first is an application to amend pleadings in terms of rule 28 of the Uniform Rules of Court (the Rules) by the plaintiff in the main action. The second interlocutory application is in the form of absolution from the instance in terms of rule 39(6) of the Rules by the defendant in the main action. The main action concerns a delictual claim for damages instituted by the plaintiff against the defendant.

Facts

- [2] The plaintiff instituted action against the Defendant for damages allegedly suffered because of injuries he sustained on 7 June 2014 at or near Kempton Park train station. The plaintiff in his particulars of claim alleged that whilst the train was in motion, he was pushed by other passengers who were jostling for space and fell through open doors.¹ However, during the plaintiff testified in chief and cross-examination that he was pulled by other passengers from a moving train.
- [3] The plaintiff further alleged that the incident that resulted in him being injured was caused by the negligence of the respondent and/or its employees. He alleged that the defendant and/or its employees allowed the train to move while the doors of the train where the plaintiff was travelling were open. In other words, according to the plaintiff the defendant/ and or its employees failed to avoid the incident when, by exercising reasonable care and diligence, it could and should have done so.

Issues

- [4] The matter was set down for hearing on 03 March 2025 and proceeded again on 4 March 2025 on the issue of merits only as per the agreement between parties. After

¹ Paragraph 4 of the plaintiff particulars of claim.

cross examination of the plaintiff and having closed his case, an application was made from the bar for an amendment of paragraph 4 of the particulars of claim seeking that the word 'pushed' should be replaced by 'pulled'.

[5] The defendant objected to the amendment and argued that the application is mala fide on the following grounds:

- a. The amendment changes the version of the plaintiff and constitutes a new cause of action which has prescribed.
- b. The proposed amendment is belated and constitutes prejudice to the Defendant.
- c. No grounds or a reasonable explanation was given in the application to justify why the proposed amendment was brought late.
- d. The proposed amendment constitutes an absurdity in that it is not supported by evidence which was led by the plaintiff.
- e. The proposed amendment seeks to cure the contradiction on pulling and pushing.

[6] On the other hand, the defendant brought an application from the bar for absolution from the instance on the following grounds:

- a. The plaintiff has not established a *prima facie* case.
- b. The evidence tendered by the plaintiff is not sufficient to warrant a reasonable person to find for him.

[7] I will deal first with the plaintiff's application for amendment of pleading and thereafter consider the defendant's application for absolution from instance.

Analysis

Amendment of pleadings

[8] The amendment of pleadings and documents is done in terms of Rule 28(1) of the Uniform Rules of Court. The rule permits the amendment of any pleading and document other than the sworn statements and sets out a process that should unfold to enable the court to consider the amendment application. It is trite that the onus is on the party seeking the amendment in this case, the plaintiff, to establish

that the other party, namely, the defendant will not be prejudiced by the amendment.² Having said that, it is permissible for the court exercising its discretion and notwithstanding anything to the contrary in the rule, at any stage before the judgment, to grant leave to amend any pleading and document.

- [9] In *Macduff and Co. (In Liquidation) v Johannesburg Consolidated Investment Co, Ltd*³ the court correctly stated the following with regarding application for amendment of pleadings:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, so that by his blunder he has done some injury to his opponent which could not be compensated for by costs or otherwise.”

- [10] In a nutshell, the rule is that an amendment will not be allowed if the application to amend is made *mala fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement.⁴ In other words, the power of the court to allow amendments is therefore limited only by considerations of prejudice or injustice to the opponent.⁵

- [11] However, it was also held that an amendment will not be allowed where it is applied for at such a late stage in the proceedings and not timeously raised to enable proper investigation and response thereto.⁶ In this regard, it was held in *Commercial Union Assurance Co Ltd v Waymark NO.*⁷ that if the amendment is not sought timeously; some reason must be given for the delay.

- [12] The granting or refusal of an application for the amendment of a pleading is a matter for the discretion of this court, to be exercised judicially in light of all the facts and circumstances before it.⁸ In this regard, this court is mindful that each case has to be determined on its own merits.

² See *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363 and *Euro Shipping Corporation of Monrovia v Minister of Agriculture & Others* 1979 (2) SA 1072 (C)

³ 1923 TPD 310

⁴ See *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225, cited with approval in *Myers v Abramson* 1951 (3) SA 438 (C) at 451B–D

⁵ *Media 24 (Pty) Ltd v Nhleko and Another* [2023] ZASCA 77 at para 16.

⁶ *Ebesa Architects (Pty) Ltd v City of Cape Town* [2023] ZAWCHC 233 at para 23.

⁷ 1995 (2) SA 73 (Tk GD)

⁸ *Brocsand (Pty) Ltd v Tip Trans Resources & Others* 2021(5) SA 457 (SCA) para 15

- [13] The plaintiff's counsel in his opening address indicated to the court that the plaintiff was pushed from a moving train and this contention was in line with paragraph 4 of the plaintiff's particulars of claim. However, the plaintiff testified in chief and under cross examination that he was pulled from a moving train. It is clear that the application for amendment was motivated by the inconsistency in the testimony of the plaintiff *vis a vis* paragraph 4 of his particulars of claim.
- [14] Having said, it is undisputed that although the inconsistency was evident during the plaintiff's examination in chief, it was only after the plaintiff's cross examination and at the close of the plaintiff's case that the plaintiff applied for the amendment of pleadings.
- [15] In my view, the plaintiff left it for too late in the proceedings to bring his application for amendment of pleadings. Worse, the plaintiff did not advance reasons why the application for amendment was brought at such a late stage in the proceedings considering the fact that the inconsistency became clear at an early stage in the proceedings.⁹ Accordingly, I am of the view that the plaintiff's application for amendment of his pleadings should fail. In my view the amendment is not made in good faith and no reasonable explanation for the delay in bringing the application was given.

Absolution from instance

- [16] An absolution from the instance application is generally brought at the end of the plaintiff's case. In this regard, rule 39(6) of the Rules provides as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which case the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."

- [17] The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its conclusion. The essential inquiry in determining whether to grant

⁹ See *Zarug v Parvathie* NO 1962 (3) SA 872 D 876 at D-E

absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or *prima facie* case.

[18] The test for absolution was set out in *Claude Neon Lights (SA) Ltd v Daniel*¹⁰ as follows:

“(W)hen absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

[19] The test was affirmed by the Supreme Court of Appeal in *Gordon Lloyd Association v Rivera and Another*.¹¹

[20] The primary issue in dispute in this matter is whether on the merits the plaintiff has proven a *prima facie* case against the defendant. The plaintiff bears the onus of proof regarding this. The plaintiff, as a single witness, elected to close his case after leading his evidence, and the defendant as it was entitled to do, sought absolution from the instance on the basis that the plaintiff has failed to make out a *prima facie* case of his claim against the defendant.

[21] A ‘*prima facie* case’ is sometimes referred to as sufficient evidence and/or ‘*prima facie* evidence’. *Prima facie* evidence is evidence which requires an answer from the other party, and in the absence of an answer from the other side, it can become ‘*conclusive proof*’.¹² It is used to refer to the probative value of the proponent’s case after discharging its burden of proof, but before the opponent has rebutted it. If left without rebuttal, the proponent’s *prima facie* case may, depending on the circumstances, be held to be conclusive.¹³

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¹¹ *Gordon Lloyd Association v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A.

¹² *Marine and Trade Insurance Co (Ltd) Van der Schyff* 1972 (1) SA 26 (A) at para 39-40

¹³ *S v Alex Carriers (Pty) Ltd* 1985 (3) SA 79 (T) at 88I-89D; *Ex parte Minister of Justice: In re: R v Jacobson and Levy* 1931 AD 466 at 478-9; *S v Boesak* 2001 (1) SACR 1 (CC) at para 24; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) para 2.

[22] In *Oosthuizen v Standard General Versekeringsmaatskappy Bpk*¹⁴ it was observed:

“If at the end of the plaintiff’s case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.”

[23] The plaintiff in this matter testified that on the date of the incident while trying to board a train that was coming from Tembisa side to Elandsfontein train station at about 20:00, he was pulled from behind by one of the passengers. At the time of the pulling, the train was in motion with open doors and subsequently he fell on the platform and sustained injuries. He testified further that at the date of the incident he had a valid monthly ticket, and the court was referred to the copy of the ticket from the trial bundle.

[24] During his cross-examination, the plaintiff reiterated that he was pulled out from a removing train by another commuter, and he fell on the platform even when it was put to him that his testimony that someone pulled him was improbable. He further testified that the words push and pull are the same and had the same effect as far as he was concerned.

[25] In addition, the plaintiff’s testimony is that the incident that resulted in him being injured was caused by the negligence of the respondent and/or its employees in addition to the “pulling” and/or “pushing”. He alleged that the defendant and/or its employees allowed the train to move while the doors of the train where the plaintiff was travelling were open. In other words, according to the plaintiff the defendant and/or its employees failed to avoid the incident when, by exercising reasonable care and diligence, it could and should have done so.

[26] It is trite that pleadings must contain clear and concise statements of the material facts upon which the pleader relies. It must be clear enough to enable the opposite party to reply to that.¹⁵ In this regard, it is important to distinguish between *facta probanda* namely, material fact that is pleaded and *facta probantia* namely, “pieces of evidence” required to prove a material fact pleaded.¹⁶

¹⁴ 1981 (A) at 1035H-36A

¹⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC), 2012 (1) SA 256 (CC) para 52.

¹⁶ *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 798B.

- [27] The plaintiff in this matter is required to establish all the elements relating to his delictual claim against the defendant.¹⁷ In this regard, material facts which were pleaded by the plaintiff in support of his cause of action (delictual claim) against the defendant is that plaintiff's falling was because of the defendant and/or its employee's negligent and breach of duty of care. In other words, the contradiction in the plaintiff's testimony regarding whether he was pushed or pulled is not a material fact because it is not a fact upon which the plaintiff's cause of action is based.
- [28] To support its application for absolution from instance, the defendant argued that a material fact which was pleaded by the plaintiff is that he was pushed out of the moving train by passengers who were jostling in the train. However, his testimony is that he was pulled out of the train by a passenger who was on the platform. According to the defendant, this contradiction alone is major and is a clear demonstration that the court might not find in favour of the plaintiff.
- [29] I disagree with the defendant. In my view, the plaintiff's cause of action or claim for delictual damages against the defendant is based on the fact that he would not have been injured had the defendant or its employee made sure that the doors were closed at the time the train was moving. This is a material fact in the plaintiff's pleaded case which, in my view, requires the defendant to respond to.
- [29] It is therefore my considered view that the contradictions in the plaintiff's evidence regarding whether he was pushed or pulled is not a material fact which warrants the granting of absolution from instance as suggested by the defendant. In my view, the plaintiff's evidence in this regard is just a *facta probantia*.
- [30] Accordingly, the defendant's application for absolution from instance should fail.

Costs

- [31] The general rule in matters of costs is that the successful party should be given his costs. In determining who the successful party is the court looks to the substance and not the form of the judgment.
- [32] The plaintiff was unsuccessful with his application to amend his pleadings. On the other hand, the defendant's application for absolution from instance has failed.

¹⁷ *Osmar Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] 3 All SA 73 SCA at para 26

Accordingly, it would be appropriate that each party should bear its own costs since they are both partial successful in this matter.

Order

[33] In the result, I make the following order:

1. The Plaintiff's application for the amendment of pleadings is dismissed.
2. The Defendant's application for absolution from the instance is dismissed
3. Each party is ordered to pay their own costs.



BOTSI-THULARE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES

For the Plaintiff:	Adv E R Masombuka instructed by Mashapa Attorneys.
For the Defendants:	Adv J Malema instructed by Padi Attorneys.
Date of Hearing:	3 and 4 March 2025
Date of Judgment:	06 May 2025